UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5315

IN RE DANIEL CHOI, Petitioner

GOVERNMENT'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO UNITED STATES DISTRICT COURT

The United States of America hereby responds to petitioner Daniel Choi's petition for a writ of mandamus/prohibition to the United States District Court (Chief Judge Royce C. Lamberth). Petitioner asks this Court to direct the district court to vacate its October 11, 2011, order granting the government's petition for writ of mandamus to Magistrate Judge John M. Facciola. Because petitioner has not established that he has no other adequate means of obtaining relief, or that his right to issuance of the writ is clear and indisputable, this Court should deny the petition for a writ of mandamus.

STATEMENT OF FACTS

On November 15, 2010, during a protest of the armed forces' "Don't Ask, Don't Tell" policy ("DADT"), Choi and 12 others handcuffed themselves to the White House fence and refused to leave the area despite three orders by the United States Park Police

(Pet. Ex. D at 6-7).[1/] All 13 protestors were arrested, and, on December 2, 2010, were charged by amended criminal complaint with failure to obey a lawful order under 36 C.F.R. § 2.32(a)(2) (Pet. Ex. D, Tab C).[2/] The incident was the third time in nine months that Choi had handcuffed himself to the White House fence during a DADT protest and failed to obey an order to leave the area (Pet. Ex. D at 15-17; Govt Ex. at Tab K). Nevertheless, the government offered both Choi and the other defendants the opportunity to resolve their cases through a deferred-sentencing agreement ("DSA")

[1/] "Pet. Ex. __" refers to the exhibits appended to Choi's petition filed in this Court. Although Choi included the government's petition for a writ of mandamus and Choi's opposition filed in the district court, he did not include the government's reply. Therefore, the government has included the reply and its attachments as an exhibit to this opposition, and will refer to them herein as "Govt Ex. __." Transcript cites will be referred to by date, session (if any), and page number. All references to the Code of Federal Regulations and the United States Code are to the 2011 editions.

[2/] Because the maximum punishment for this offense is six months' imprisonment, 36 C.F.R. § 1.3(a) and 16 U.S.C. § 3, it is a Class B misdemeanor, a "petty offense." 18 U.S.C. §§ 19 and 3559(a)(7). The magistrate court therefore had jurisdiction over the case. 18 U.S.C. § 3401(a) ("When specially designated to exercise such jurisdiction by the district court . . . he serves, any United States magistrate judge shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district") and § 3401(b) ("Any person charged with a misdemeanor, *other than a petty offense*[,] may elect . . . to be tried before a district judge") (emphasis added); Rules of the United States District Court for the District of Columbia, LCrR 58(a) (designating magistrate judges to exercise jurisdiction consistent with 18 U.S.C. § 3401).

(id.). On May 10, 2011, all the defendants except Choi accepted the DSA and pleaded guilty (Pet. Ex. D at 10).

Choi's case was set for trial on Monday, August 29, 2011, before Magistrate Judge Facciola. In a telephone conversation with defense counsel on Wednesday, August 24, 2011, government counsel learned that defense counsel planned to introduce at trial photographs of individuals in front of the White House celebrating the death of Osama bin Laden, in support of a claim that Choi was being selectively prosecuted (Pet. Ex. D at 11). In a telephonic status conference the next day, government counsel noted that if Choi wished to pursue a selective-prosecution claim, he was required to file a pretrial motion to dismiss under Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure (8/25/11 Tr. 2, 7). Magistrate Judge Facciola responded, "your objection will be reserved, and . . . I will consider it when I try the case" (id. at 7). When government counsel later returned to the selective-prosecution issue, inquiring whether the parties would litigate it, Magistrate Judge Facciola stated, "I will hear, at the conclusion of the case, any legal arguments anyone wishes to make; one of which I take it will be that in prosecuting Mr. Choi but not prosecuting these [White House revelers], the government is engaging in selective prosecution in violation of the Fifth Amendment" (id. at 10-11).

On Friday, August 26, 2011, government counsel offered to resolve Choi's case through a deferred-prosecution agreement, under which, if Choi refrained from being arrested upon probable cause and complied with all release conditions set by the magistrate judge for a period of four months, the government would dismiss the complaint (Pet. Ex. D at 12). Choi declined the offer (id.).

On Sunday, August 28, 2011, the government filed a motion in limine asking the magistrate court, inter alia, to preclude a claim of selective prosecution (Pet. Ex. D, Tab A). Relying on United States v. Armstrong, 517 U.S. 456 (1996), and United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983), the government argued that, because "'[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution,'" such a claim must be brought by pretrial motion to dismiss the complaint under Fed. R. Crim. P. 12(b)(3)(A) (Pet. Ex. D, Tab A, at 7) (quoting Armstrong, 517 U.S. at 463)). The government further argued that, because Choi had failed to file a pretrial motion to dismiss the complaint, he had waived the issue under Rule 12 and should be prohibited from adducing evidence of selective prosecution at trial (id. at 7-9).[3/]

[3/] Noting that there was no allegation that the White House (continued...)

On the morning of August 29, before trial began, government counsel requested a ruling on the motion in limine, again arguing that a claim of selective prosecution is not a trial defense and should be addressed pretrial (8/29/11 a.m. Tr. 4-5). The magistrate court declined to rule on the motion, and directed government counsel to call her first witness (id. at 5). The magistrate court thereafter allowed the defense to elicit testimony purportedly supporting a claim of selective prosecution and, on August 31, during the defense case, sua sponte expressed the view that a prima facie case of selective prosecution had been presented (8/31/11 a.m. Tr. 8). The magistrate court later clarified that it viewed the issue as one of vindictive prosecution rather than selective prosecution, based on the fact that Choi had been prosecuted in federal court after his November 15, 2010, arrest, but had not been prosecuted federally after either of his two earlier arrests, which occurred in March and April of 2010 (8/31/11 p.m. Tr. 2-3). According to the magistrate court, this raised the inference that the instant prosecution was based on the nature of Choi's speech (id. at 3). Government counsel pointed out that vindictive prosecution is not a defense on the merits, but is

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revelers had refused to obey a lawful order, the government also argued that Choi had failed to make out a prima facie case of selective prosecution (Pet. Ex. D, Tab A, at 9-12).

instead a challenge to the constitutionality of the prosecution, and therefore should be handled separately from a trial on the merits (id. at 5-6). In response, the magistrate judge acknowledged that, if the issue had been raised pretrial and he had dismissed the complaint on the grounds of vindictive prosecution, the government would have been able to appeal the dismissal (id.). Nevertheless, the magistrate judge indicated that he would allow the defense to pursue the claim as a defense on the merits (id. at 3, 6-7).

Recognizing that jeopardy had attached, the magistrate court asked if government counsel wished the proceeding to be stopped so that the government could seek mandamus, and government counsel responded affirmatively (8/31/11 p.m. Tr. 8). The magistrate court granted the government's request to "continue" the proceedings, denied an oral defense motion to dismiss the case under Fed. R. Crim. P. 48(b)(3), and gave the government 10 days within which to file a petition for writ of mandamus (id. at 18). On September 12, 2011, the government timely filed a petition for writ of mandamus in the district court (Pet. Ex. D). The government sought an order directing the magistrate court to: "(1) refrain from considering selective or vindictive prosecution as a defense to the charge of failure to obey a lawful order; (2) preclude any further evidence in support of a claim of selective or vindictive prosecution at

trial; (3) deny as waived any motion to dismiss that the defense may file mid-trial or post-trial based on selective or vindictive prosecution; and (4) refrain from sua sponte consideration of dismissal based on selective or vindictive prosecution either mid-trial or post-trial" (Pet. Ex. D at 5).

On October 7, 2011, after further briefing by the parties (Pet. Ex. E; Govt Ex.), Chief Judge Lamberth held a hearing on the petition. By order and memorandum opinion dated October 11, 2011, Chief Judge Lamberth granted the government's petition (Pet. Ex. A, B). After first addressing his jurisdiction to consider the petition (Pet. Ex. A at 4-10),[4/] Chief Judge Lamberth ruled that the government had established a right to the "extraordinary remedy" of mandamus because (1) Magistrate Judge Facciola "clear[ly] and indisputabl[y]" erred in (a) treating the selective/vindictive prosecution claim as a defense on the merits and (b) failing to deem such a claim waived under Fed. R. Crim. P. 12(b)(3)(A) and 12(e); (2) the government had no other adequate means of redress because (a) if Magistrate Judge Facciola were to acquit on the basis of a selective/vindictive prosecution claim, or sua sponte

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[4/] Chief Judge Lamberth concluded that he had jurisdiction under the All Writs Act, 28 U.S.C. § 1651, because, in the context of a magistrate-judge proceeding under 18 U.S.C. § 3401, "the district court sits in an appellate capacity vis a vis the magistrate judge" (Pet. Ex. A at 10).

dismiss on that basis without Choi's consent, the government would have no right of appeal,[5] and (b) in any event, the government would suffer "irreparable harm" if it were forced to defend against a claim Choi was "not entitled to make"; and (3) mandamus was "appropriate" because, under the unique circumstances of this case, "mandamus is the only credible option to enforce the law" (id. at 10-17). On November 7, 2011, Choi filed the instant petition.[6]

ARGUMENT

PETITIONER HAS NOT ESTABLISHED A RIGHT TO THE EXTRAORDINARY REMEDY OF MANDAMUS

The Supreme Court repeatedly has described the writ of mandamus as a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" Cheney v. U.S. District Court, 542 U.S. 367, 380 (2004) (quoting Ex parte Fahey, 332 U.S. 258, 259-260 (1947)). See, e.g., Gulfstream Aerospace Corp. v Mayacamas Corp., 485 U.S. 261, 289 (1988) (same); Allied Chemical Corp. v. Daiflon,

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[5] At the hearing, Choi's counsel asserted that Choi would not consent "to anything other than a full trial or a dismissal by the United States Attorney's Office with an apology in open court on the record" (10/7/11 Tr. 16).

[6] Choi also noted an interlocutory appeal of Chief Judge Lamberth's Order. United States v. Choi, No. 11-3094 (filed October 27, 2011). On November 9, 2011, the United States moved to dismiss the interlocutory appeal for lack of jurisdiction. That motion remains pending. On November 22, 2011, the United States moved to consolidate this case with the interlocutory appeal in No. 11-3094. That motion also remains pending.

Inc., 449 U.S. 30, 34 (1980) (same). "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." Allied Chemical Corp., 449 U.S. at 35.

Paramount among the reasons that mandamus relief is extraordinary is that "it indisputably contributes to piecemeal appellate litigation." Allied Chemical Corp., 449 U.S. at 35. "A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would 'run the real risk of defeating the very policies sought to be furthered by [the Judiciary Act of 1789],'" through which Congress determined that "as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court." Id. (quoting Kerr v. U.S. District Court, 426 U.S. 394, 403 (1976)). Because of this concern, mandamus relief is not available unless the party seeking the writ has "no other adequate means to attain the relief he desires." Cheney, 542 U.S. at 380. See also id. (requirement that petitioner have no other adequate means of relief is "designed to ensure that the writ will not be used as a substitute for the regular appeals process") (citing Fahey, 332 U.S. at 260). In addition, to obtain mandamus relief, a petitioner "must satisfy the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" Id. at 381 (quoting Kerr, 426 U.S. at

403; other quotations and citations omitted). Finally, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Id. at 381 (citing Kerr, 426 U.S. at 403).

A. PETITIONER'S RIGHT TO POST-CONVICTION APPEAL IS AN ADEQUATE MEANS TO ADDRESS HIS SELECTIVE- AND VINDICTIVE-PROSECUTION CLAIMS

Choi asserts two reasons why he has no adequate means of relief besides mandamus, but each of his assertions is meritless.

First, Choi argues that if the magistrate judge acquits him of failure to obey a lawful order, he will be unable to obtain review of the denial of his selective- or vindictive-prosecution defense (Petition at 14), and will have been foreclosed from "expos[ing] the Government's persecution of him" (id. at 15). Choi is correct that he would have no right to appeal an acquittal, see Rule 58(g)(2)(B) (defendant may appeal magistrate judge's judgment of conviction or sentence to district judge), but an acquittal causes no harm in need of a remedy, much less the "drastic and extraordinary" remedy of mandamus. Cheney, 542 U.S. at 380 (quotation omitted). Moreover, Choi's inability to pursue a selective- or vindictive-prosecution defense is entirely the result of Choi's own failure to raise the claim in a pretrial motion pursuant to Rule 12(b)(3)(A) of the Federal Rules of Criminal

Procedure.[7] As he acknowledges in his petition, he knew the basis for his claim, at the latest, on August 24, 2011, when his counsel represented to the prosecutor during a phone call that he was planning to introduce at trial photographs of individuals in front of the White House celebrating the death of Osama bin Laden, and to argue that Choi was being selectively prosecuted (Petition at 3).[8]

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[7] Rule 12(b)(3)(A) provides that a motion "alleging a defect in instituting the prosecution" must be raised before trial. Failure to file a motion required to be filed before trial under Rule 12(b)(3)(A) results in a waiver absent a showing of good cause. Fed. R. Crim. P. 12(e). See United States v. Gary, 74 F.3d 304, 313 (1st Cir.) (absent "exceptional circumstances," "a claim of selective prosecution that is not raised prior to trial is deemed waived"), cert. denied, 518 U.S. 1026 (1996); United States v. Taylor, 562 F.2d 1345, 1356 (2d Cir.) (selective-prosecution claim made after five weeks of trial untimely because it alleged a defect in the institution of the prosecution, which must be raised before trial under Rule 12), cert. denied, 432 U.S. 909 (1977); (Ronald) Jarrett v. United States, 822 F.2d 1438, 1442 (7th Cir. 1987) (Rule 12(b) requires motions alleging selective or vindictive prosecution to be made pretrial or they will be deemed waived; reviewing whether trial counsel was ineffective for failing to file pretrial motion; and concluding there was no ineffectiveness because any such motion lacked merit).

[8] Choi suggests that Magistrate Judge Facciola's reference to Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), during a March 18, 2011, status hearing, raised the issue of selective prosecution. This is not correct. On March 18, when discussing with the parties whether the 13 defendants might be able to plead guilty to disorderly conduct under the District of Columbia Code, as the magistrate judge noted the government had done in the early demonstration cases of the 1950s and 60s, the magistrate judge referenced the Shuttlesworth case, asking "[w]asn't that a discon (phonetic) case involving Martin Luther King?" (3/18/11 Tr. 17-18). Defense counsel responded, "Absolutely, Sh[uttlesworth]" (id. at 18). No mention was made of selective prosecution, and

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Choi also knew, by April 25, 2011, at the latest, that the government's view was that Rule 12(b)(3)(A) required him to pursue any selective-prosecution claim by pretrial motion (8/25/11 Tr. 7). Despite this, and despite the government's pretrial filing of a motion in limine seeking to preclude the defense as waived due to the failure to file such a motion, Choi still did not file a Rule 12(b)(3)(A) motion to dismiss, nor did he make such a motion orally before trial began, nor did he seek discovery in aid of a potential motion. To the extent Choi now complains that, if he is acquitted, he will have been denied the opportunity to pursue a selective- or vindictive-prosecution claim, the fault is entirely his own and does not establish the necessity for mandamus relief.

Second, Choi argues that, if he is convicted by the magistrate court, he will have no meaningful appeal because his appeal will be

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Shuttlesworth is not a selective-prosecution case. See Shuttlesworth, 394 U.S. at 148 (invalidating city ordinance that made it an offense to participate in any parade, procession, or public demonstration without first obtaining a permit from the City Commission, where the ordinance provided no criteria for issuing or refusing to issue permits and where the City Commission had refused to issue a permit to the African-American defendants without asserting any grounds for the refusal and without indicating that a permit would be approved if a time and place were selected that would minimize traffic problems). Moreover, even if this reference somehow put the government on notice of a potential selective-prosecution claim, defendant Choi was likewise on notice, and nevertheless filed no pretrial motion to dismiss (nor any mid-trial motion to dismiss) on selective-prosecution grounds.

to Chief Judge Lamberth, who is the same judge who issued the writ of mandamus barring his selective- or vindictive-prosecution claim (Petition at 16). Choi argues that, to avoid this result, he will have to file an interlocutory appeal to this Court, which will "take excruciating time" (id.).[9/] He further asserts that, if the magistrate court were to resume the trial during the course of the interlocutory appeal and proceed to conviction, but this Court ultimately were to reverse, the original trial would have been "a waste of money and time for the District Court, for Defendant Choi (who is not receiving state-provided assistance of counsel) and, notably, for the *Government* (id. at 16-17) (emphasis in original). These arguments do not establish that there is no other adequate means of relief besides mandamus.

The fact that an appeal from a conviction by Magistrate Judge Facciola would be first to Chief Judge Lamberth[10/] does not deprive Choi of a meaningful opportunity to appeal. As an initial matter, judges are presumed to know and apply the law correctly, United

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[9/] Choi neglects to mention that he has in fact already filed an interlocutory appeal. See supra at 8 n. 6.

[10/] Rule 58(g)(2)(B) provides that a defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry. Local Criminal Rule 57.14(7) authorizes the chief judge of the district court to "hear and determine requests for review of rulings by magistrate judges in criminal cases not already assigned to a judge of the Court."

States v. Ayers, 428 F.3d 312, 315 (D.C. Cir. 2005), and there is no reason to believe that Chief Judge Lamberth could not meaningfully review any issues raised on appeal, including issues related to the grounds for issuing the writ of mandamus. Moreover, should the district court affirm the conviction, Choi would have the right to appeal that final judgment to this Court. See 28 U.S.C. § 1291 (courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States"); United States v. Forcellati, 610 F.2d 25, 28 (1st Cir. 1979) ("[t]he statutory grant to the courts of appeals of jurisdiction to review 'all final decisions' of district courts is literally sufficient to include final decisions reviewing criminal convictions before magistrates"), cert. denied, 445 U.S. 944 (1980); United States v. Gagnon, 553 F.3d 1021, 1023 (6th Cir.) (same), cert. denied, 130 S. Ct. 115 (2009); United States v. Rosario, 118 F.3d 160, 162 (3d Cir. 1997) (same); United States v. Aslam, 936 F.2d 751, 754 (2d Cir. 1991) (same); United States v. Van Fossan, 899 F.2d 636, 638 (7th Cir. 1990) (same); see also United States v. Pilati, 627 F.3d 1360, 1363-64 (11th Cir. 2010) (appellant must appeal conviction of magistrate judge to district court first; appellate court is second-tier of appellate review); United States v. Soolook, 987 F.2d 574, 575 (9th Cir. 1993) (same). Indeed, this Court recently exercised its jurisdiction to reverse

a conviction on appeal from a district court's affirmance of the judgment of a magistrate judge. United States v. Sheehan, 512 F.3d 621, 623-24 (D.C. Cir. 2008).

Should it be determined on post-judgment appeal to this Court that the district court erroneously precluded Choi from raising a claim of selective or vindictive prosecution, whether as a defense on the merits or as grounds for a mid- or post-trial motion to dismiss the complaint, such an error would be grounds for reversal and/or remand. See Sheehan, 512 F.3d at 624 (reversing conviction for demonstrating on White House sidewalk without a permit and remanding for new trial, where defendant was "prevented from offering a viable defense").[11/]

[11/] Sheehan alone refutes Choi's claim that "no peaceful White House protestor in 22 years and 2,000 arrests ha[s] been charged federally," which he attributes to the testimony of U.S. Park Police Officer Jerome Stoudamire and uses to support his assertion that "there is no question that the Government selectively/vindictively prosecuted Lt. Choi" (Petition at 15). Sheehan and a number of other peaceful protestors were arrested and charged with demonstrating on the White House sidewalk without a permit, pursuant to 36 C.F.R. § 7.96(g)(2). 512 F.3d at 625. She and 28 other defendants were tried jointly in U.S. District Court before a magistrate judge. Id. As for Officer Stoudamire's testimony, he did not testify as Choi claims. Rather, Officer Stoudamire was asked if he recalled, in cases where he had "effectuated arrests at the White House," "how many of those times [he] found [him]self having cases they say papered in superior court as opposed to this court?" to which he responded, "I would have to say this is the first time" (8/29/11 p.m. Tr. 135). Because the officer was testifying in federal court, presumably he meant that it was the first time he testified in federal court as

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Because Choi, if convicted, will be able to raise all of his current claims in a post-judgment appeal, he cannot establish that, without mandamus, he has no other adequate means to attain relief. To grant mandamus in these circumstances would "indisputably undermine[] the policy against piecemeal appellate review," Allied Chemical Corp., 449 U.S. at 191, and would defeat the purpose of 28 U.S.C. § 1291. This is particularly so because the Supreme Court and this Court both have held that denial of a motion to dismiss based on a vindictive-prosecution claim is not interlocutorily appealable. United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982); United States v. Brizendine, 659 F.2d 215, 222 (D.C. Cir. 1981). As the Supreme Court reasoned in Hollywood Motor Car Co.:

> Obviously, it is wholly desirable to correct prior to trial any substantive errors noticed at that time. It is equally evident that when relief must await postconviction proceedings, the defendant is subjected to the burden of defending himself at trial, even though the presence of errors might require reversal of his conviction and possibly a second trial. Nevertheless, reversal of the conviction and, where the Double Jeopardy clause does not dictate otherwise, the provision of a new trial free of prejudicial error normally are adequate

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opposed to Superior Court. Officer Stoudamire had earlier testified that he had been a member of the Park Police S.W.A.T. team for 22 years, and that he had been involved in "maybe a couple thousand" arrests (id. at 95-96). Officer Stoudamire did not claim to have information about arrests or prosecutions in which he did not participate.

> means of vindicating the constitutional rights of the accused.

458 U.S. at 268. See also Brizendine, 659 F.2d at 222 (denial of motion to dismiss on vindictive-prosecution grounds not immediately appealable; "[i]f the appellants' due process claims are upheld on appeal after final judgment, the court can provide effective relief by . . . reversing and remanding for reindictment and a new trial"). This is so because the due-process right to be free from vindictive prosecution is not a "right not to be tried," Hollywood Motor Car Co., 458 U.S. at 269, but a right that may adequately be vindicated by "the provision of a new trial free of prejudicial error." Id. at 268. The Supreme Court further reasoned that if interlocutory appeal of constitutional claims were permitted:

> questions as to the constitutionality of the statutes authorizing the prosecution and doubtless numerous other questions would fall under such a definition, and the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions. It is only a narrow group of claims which meet the test of being "effectively unreviewable on appeal from a final judgment," and the claim of prosecutorial vindictiveness is, we hold, not one of them.

Id. at 270 (referring to the limited category of cases that fall within the collateral-order exception to 28 U.S.C. § 1291 delineated in Cohen v. Beneficial Industrial Loan Corp., 37 U.S. 541 (1949)). See also Brizendine, 659 F.2d at 224 (cautioning that, if it were to hold that the claim of vindictive prosecution

during the plea-bargaining process were interlocutorily appealable, it "would open the door to interlocutory appeals in a high proportion of criminal cases").

The rationale of Hollywood Motor Car Co. and Brizendine applies equally to Choi's petition for mandamus. Although post-conviction relief "will not spare the defendant the burden of defending himself at trial," Brizendine, 659 F.2d at 222, the right Choi asserts is not a right not to be tried, but a right to a trial free of vindictive prosecution. He will have a full opportunity to litigate this right if he is convicted by the magistrate court and his conviction affirmed by the district court. For this reason alone, this Court should summarily deny Choi's petition for a writ of mandamus.

B. PETITIONER HAS NOT ESTABLISHED A CLEAR AND INDISPUTABLE RIGHT TO RELIEF

Although this Court need not address the second prerequisite to mandamus relief, Choi has failed to establish that the district court clearly and indisputably erred in granting the writ of mandamus to the magistrate judge.

Choi argues that the district court lacked jurisdiction to issue mandamus to the magistrate judge because mandamus "can only issue from a true appellate court to an inferior court, and not between judges - even unequal under Articles I and III - of the

same court - if only as a matter of comity" (Petition at 18). Choi cites no authority, however, that precludes the district court, which sits in an appellate capacity with regard to criminal misdemeanors tried before the magistrate court, from granting mandamus to a magistrate judge in a criminal case. See 18 U.S.C. § 3401(a) (authorizing magistrate judges to try persons accused of misdemeanors when specially designated to exercise such jurisdiction by the district court served); Fed. R. Crim. P. 58(g)(2)(A) (permitting interlocutory appeal from an order of a magistrate judge to a district judge in misdemeanor cases "if a district judge's order could similarly be appealed," and requiring filing of notice of appeal within 14 days of entry of the order); Fed. R. Crim. P. 58(g)(2)(B) (permitting appeal of conviction or sentence by magistrate judge to district judge and requiring filing of notice of appeal within 14 days of entry of judgment). See also In re Tennant, 359 F.3d 523, 528 (D.C. Cir. 2004) ("'[W]here a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.'") (quoting McClellan v. Carland, 217 U.S. 268, 280 (1910)); cf. In re Calore Express Co., 226 B.R. 727, 733 (D. Mass. 1998) (district court issuing writ of mandamus to Bankruptcy Court).

Moreover, although the authority of a district court to issue a writ of mandamus to a magistrate judge rarely has been discussed in the case law, there is precedent for such review in this jurisdiction. See Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991) (reviewing district court's denial of petition for writ of mandamus to magistrate court and affirmance of magistrate's order sealing plea agreement). Other circuits also have indicated that the district court is the proper court in which to seek mandamus review of a ruling by a magistrate judge. See United States v. Ecker, 923 F.2d 7, 9 (1st Cir. 1991) (dismissing appeal of commitment order issued by magistrate judge and rejecting argument that, if order was not directly appealable to court of appeals, appellate court should consider it a petition for mandamus: "If Ecker wanted a writ of mandamus directing the magistrate to rescind his commitment order . . . he should have directed his argument to the district court originally."); Califano v. Moynahan, 596 F.2d 1320, 1322 (6th Cir. 1979) (denying petition for writ of mandamus directing district court to pass one way or other on actions of magistrate, because petitioner never sought review in district court; "[i]f the Secretary [of Health, Education and Welfare] conceived that the magistrate had overreached his powers, he should have moved the district judge to vacate the order and directly consider the matter himself . . . .").

Given the appellate jurisdiction of the district court over misdemeanor cases tried in magistrate court, the practice in this jurisdiction and others, and the lack of any authority suggesting otherwise, Choi has not established that Chief Judge Lamberth clearly and indisputably erred in exercising jurisdiction over the government's petition for a writ of mandamus to Magistrate Judge Facciola.

Choi next argues that Chief Judge Lamberth erred in determining that the government would suffer irreparable harm if it were forced to engage in discovery and litigation, at considerable time and expense, to defend against a selective- or vindictive-prosecution claim that Choi waived (Petition at 20-21).[12/] Choi argues that the government created the problem by failing to dismiss the charge against him when it was put on notice pretrial that he intended to assert a selective- or vindictive-prosecution claim (id. at 21), and by waiting until the third day of trial to file its petition for mandamus (id. at 28-29). Intertwined with this argument is Choi's assertion that he did not waive his right to raise a selective- or vindictive-prosecution claim by failing to

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[12/] Choi does not contend that the district court erred in holding that a selective- or vindictive-prosecution claim is not a defense on the merits, nor does he argue that the portion of the writ directing the magistrate court not to consider it as a defense on the merits is erroneous or requires correction.

file a Rule 12(b)(3)(A) motion pretrial, and that the magistrate court properly could defer the claim to trial (id. at 23-27). The record does not establish that Chief Judge Lamberth clearly and indisputably erred.

As we have discussed supra at 10-11 & n.7, a selective- or vindictive-prosecution claim alleges "a defect in instituting the prosecution," Fed. R. Crim. P. 12(b)(3)(A), which must be raised pretrial or is deemed waived under Fed. R. Crim. P. 12(e). Choi cannot rely on the failure of the magistrate judge to set a deadline for pretrial motions to relieve him from his obligation to file any motion at all. Nor can he rely on good cause or exceptional circumstances to excuse his waiver. See Gary, 74 F.3d at 313 (absent "exceptional circumstances," "a claim of selective prosecution that is not raised prior to trial is deemed waived"). As we pointed out supra at 10-12, Choi acknowledges that he was aware of the basis for a selective-prosecution claim before trial, when he suggested that he had been treated differently than the people who spontaneously gathered at the White House after the announcement that Osama bin Laden had been killed. He was also aware of the basis for his vindictive-prosecution claim, which he claimed in his pleadings to the district court was based on his own testimony that he was charged with municipal traffic violations after his March and April 2010 arrests (which charges ultimately

were dismissed), whereas he was charged with a federal crime after his November 2010 arrest (Pet. Ex. E at 20-22). The only evidence on which Choi attempts to rely to establish his right to raise vindictive prosecution mid-trial are some communications between officials in the White House Office of Public Engagement, the U.S. Secret Service, and the U.S. Park Police showing that officials were aware of the planned protest in advance and that the Park Police had considered what federal regulations the act of chaining oneself to the White House fence might violate (Petition at 26; see also Pet. Ex. C; Govt Ex. at Tab J). These communications fall far short of establishing vindictive prosecution, much less exceptional circumstances that warrant excusing Choi from his waiver.

"'Prosecutorial vindictiveness' is a term of art with a precise and limited meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987) (citing United States v. Goodwin, 457 U.S. 368, 372 (1982)). There are two ways a defendant may demonstrate prosecutorial vindictiveness: either by showing "actual vindictiveness - that is, he may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights," or by relying on a presumption of vindictiveness based on facts that

indicate "a realistic likelihood of vindictiveness," which the government is obliged to rebut Id. (citations omitted). The doctrine "'precludes action by a prosecutor that is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution.'" United States v. Safavian, 649 F.3d 688, 692 (D.C. Cir. 2011) (quoting Maddox v. Elzie, 238 F.3d 437, 446 (D.C. Cir. 2001)).

Here, Choi suggests that the evidence that the Park Police had prior knowledge of the protest and had considered in advance how to charge the protestors raises a sufficient claim of vindictive prosecution to be raised mid-trial, even if such claims ordinarily should be raised pretrial. Choi's argument is not a traditional application of the prosecutorial-vindictiveness doctrine, but even assuming its applicability, Choi has not alleged enough to raise even the presumption of vindictiveness, and certainly has not established cause for failing to raise his claim pretrial.

In Safavian, the district court found a presumption of vindictiveness where the defendant was indicted on five counts, convicted on four counts, appealed, and won reversal or remand of the convictions on all four counts. 649 F.3d at 690. Following failed plea negotiations, the government returned a new indictment charging the defendant with five counts, two of which were based on previously uncharged conduct. Id. at 690-91. After a jury found

him guilty on the new counts, as well as on two of the counts that mirrored the original indictment, he moved for acquittal on the new counts on the ground that they were added to the second indictment due to prosecutorial vindictiveness. Id. at 691. Despite finding that the prosecutor's addition of new charges after the defendant's successful appeal raised a presumption of vindictiveness, the district court denied the defendant's motion, finding that the government offered objective evidence sufficient to rebut it. Id. at 692. This Court affirmed. Using language particularly applicable to this case, the Court held that "[t]he [g]overnment was objectively reasonable in responding to this court's ruling on appeal by changing its trial strategy and refocusing the indictment to include conduct lying outside the scope of the defendant's defense." Id. at 694.

In this case, unlike in Safavian, there is no chain of events that raises a presumption of prosecutorial vindictiveness. Choi's March and April 2010 cases were charged as violations of a D.C. traffic regulation that prohibits the failure to comply with any lawful order or direction of any police officer vested with authority to direct, control, or regulate traffic. See D.C.M.R. § 2000.2; Govt Ex. at Tab K. The cases were not presented to the U.S. Attorney's Office, but were presented to and papered by the D.C. Office of the Attorney General (OAG), which has the

responsibility for prosecuting traffic offenses (Govt Ex. at Tab K). The OAG subsequently dismissed the cases (id.), possibly because of concern that standing on the masonry ledge and chaining oneself to the White House fence does not violate the traffic regulations. The cases were not dismissed on motion of defendant Choi, or based on any assertion of a constitutional or statutory right by defendant Choi, but instead were dismissed on OAG's own motion (id.). By the time Choi engaged in the same conduct in November 2010, the Park Police had done some additional research and determined that Choi's anticipated conduct (and that of the rest of the demonstrators) could violate 36 C.F.R. § 2.32(a)(2), which prohibits "[v]iolating the lawful order of a government employee or agent authorized to maintain order and control public access and movement during . . . other activities where the control of public movement and activities is necessary to maintain order and public safety." See Govt Ex. at Tab J. U.S. Park Police Officer Stoudamire testified that, when the Park Police monitor demonstrations at the White House sidewalk, they are concerned about "the safety of the public, the safety of the officers and the safety of the demonstrators," as well as the safety of the individuals inside the White House (8/29/11 p.m. Tr. 144). Officer Stoudamire testified that handcuffing oneself to the White House fence raised a safety concern because, for example, if an incident

arose that required an emergency response by the Park Police and Secret Service in the White House area, the person would be unable to free himself, and the law-enforcement officers would have to address that situation during the emergency (8/29/11 p.m. 120-24). The fact that the Park Police responded to the two previously dismissed cases by researching whether chaining oneself to the White House fence and refusing to leave violated any other applicable law or regulation does not suggest vindictiveness on the part of the government.

Far from establishing that Chief Judge Lamberth clearly and indisputably erred by granting the writ, Choi's current argument illustrates the very reason why the federal rules require challenges to the constitutionality of a prosecution to be made pretrial. Had Choi raised either of his current claims pretrial, the magistrate judge could have determined whether Choi made an adequate showing to warrant discovery or further inquiry. The government then could have assessed the claims, determined the extent of resources that would be required to respond to the discovery requests or the asserted claims, and made decisions about whether the expenditure of the government's scarce resources was warranted in order to continue the prosecution. The Supreme Court has recognized the burden associated with responding to a selective-prosecution claim:

> If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

United States v. Armstrong, 517 U.S. 456, 468 (1996). In this case, as Chief Judge Lamberth recognized, responding to Choi's waived selective- and vindictive-prosecution claims might entail not just gathering information related to past prosecutions by the U.S. Attorney's Office, but also gathering historical arrest and prosecution data from the U.S. Park Police, the U.S. Secret Service, and the OAG. Because the offenses charged in demonstration cases are often petty misdemeanors or traffic violations, records and reports may not be as detailed as they would be for more serious offenses. To supplement the raw data, many law-enforcement officers and prosecutors might need to be interviewed. The resource expenditure for the government would be significant. Had defendant Choi filed a motion to dismiss on either selective- or vindictive-prosecution grounds before trial, as required by Rule 12(b)(3)(A), and had the magistrate judge determined that further inquiry was warranted, the government could have made a considered decision regarding whether the costs of

responding were justified in order to maintain the prosecution of what is, under the federal regulations, a petty offense.

Instead, Choi, with full knowledge of the bases for his current claims, filed no motion, and instead sought to raise his selective-prosecution claim at trial as a defense. The trial to determine Choi's guilt or innocence of failing to obey a lawful order of the Park Police was derailed by defense counsel's questioning on issues related to selective and vindictive prosecution, issues which should have been raised and addressed pretrial. The magistrate judge clearly erred by allowing this to happen. Petitioner Choi has not established that Chief Judge Lamberth clearly and indisputably erred by issuing a writ of mandamus to remedy the magistrate judge's error.

C. PETITIONER HAS NOT ESTABLISHED THAT ISSUANCE OF THE WRIT IS APPROPRIATE UNDER THE CIRCUMSTANCES.

In granting the government's petition for a writ of mandamus to Magistrate Judge Facciola, Chief Judge Lamberth considered the "rare set of circumstances" presented by the case (Pet. Ex. A at 16). Because the magistrate judge had indicated that he would consider acquittal based on a claim unrelated to Choi's guilt or innocence, or would consider sua sponte dismissal of the case, over Choi's objection - neither of which would be appealable by the government - Chief Judge Lamberth concluded that the remedy of

mandamus was appropriate. Although there remained the possibility that Choi himself would move for dismissal on selective- or vindictive-prosecution grounds, he had not so moved, and the Chief Judge appropriately considered that because any potential claim had been waived, the government should not be put to the burden of engaging in costly litigation to defend a waived claim. The Chief Judge did not abuse his discretion in considering the unique circumstances of this case, and Choi has not established that issuance of a writ vacating the Chief Judge's order is "appropriate under the circumstances." Cheney, 542 U.S. at 381.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny Choi's petition for writ of mandamus/prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, this 19th day of December, 2011, I caused two copies of the foregoing Opposition to Petition for Writ of Mandamus to be served by U.S. Mail, postage prepaid, on petitioner, as follows:

Daniel Choi
271 W. 47th Street, #40D
New York, NY 10036

and by electronic mail to:
danchoi2008@gmail.com

/s/

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ADDENDUM

Pursuant to D.C. Circuit Rule 21(d), the United States includes as an addendum this certificate as described in Circuit Rule 28(a)(1)(A):

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici: The parties to this petition are petitioner, Daniel Choi, and respondent, the United States of America.

B. Rulings Under Review: Petitioner seeks review of Chief Judge Royce C. Lamberth's October 11, 2011, order in Mag. No. 10-739-11, granting the government's petition for a writ of mandamus to the magistrate court (Magistrate Judge John M. Facciola).

C. Related Cases: This case has not been before this Court previously.

EXHIBIT

Government's Reply to Defendant's Opposition to Petition for Writ of Mandamus, with attachments (filed September 28, 2011)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Magistrate No. 10-739-11 (RCL/JMF)**
	:	
v.	:	
	:	
DANIEL CHOI,	:	
Defendant	:	
	:	

GOVERNMENT'S REPLY TO DEFENDANT'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

The government agrees with defendant Daniel Choi that "the decision to allow Lt. Choi to pursue the defense [of selective or vindictive prosecution] is the operative decision for purposes of mandamus analysis" (Opp. at 14).[1] We also agree that "a selective/vindictive-prosecution [defense] is not on the merits of the charge" (Opp. at 15), and that any dismissal based on selective or vindictive prosecution is appealable by the government (Opp. at 16). Thus, it appears that the government and Choi are in agreement that, if the magistrate judge is considering selective or vindictive prosecution as a defense on the merits, rather than as grounds for dismissal, that is clear and indisputable error. Because this error could result in the denial of the government's right to appeal, no adequate remedy other than mandamus exists, and the magistrate judge should be ordered not to consider selective or vindictive prosecution as a defense on the merits at Choi's trial.

The government also seeks the writ to prohibit the magistrate judge from considering a mid-trial or post-trial motion to dismiss (whether filed by the defendant or raised by the magistrate court sua sponte) based on selective- or vindictive-prosecution grounds. The rules requiring such claims to be made pretrial exist for good reason. Claims of selective or vindictive prosecution, if adequately

[1] "Opp." refers to Choi's opposition to the government's petition for a writ or mandamus; "Petition" refers to that petition.

supported, necessitate discovery of large quantities of historical data regarding law-enforcement and prosecutorial decisions. When such a claim is made before trial, the government has the opportunity to assess the claim, gather the data necessary for informed decision-making, and determine whether the resources needed to respond to the claim are justified relative to the importance of the prosecution. Because defendant Choi did not raise his claims until trial, and still has not filed a motion setting forth his claims with any specificity, the government was deprived of this opportunity. Under Rule 12(e) of the Federal Rules of Criminal Procedure, his current claims should have been deemed waived by the magistrate judge, and the magistrate judge clearly erred by failing to do so. As the record reveals, Choi was well aware of the bases of both of his current claims before trial, yet deliberately did not press either in a pretrial motion, allowing jeopardy to attach and then asserting them as trial defenses. Only now, in his opposition, has Choi agreed that neither selective prosecution nor vindictive prosecution is a defense on the merits. No exceptional circumstances warrant excusing him from his waiver, and the magistrate judge should not be permitted to entertain a motion to dismiss mid-trial or post-trial on either selective- or vindictive-prosecution grounds, nor should it be permitted to consider dismissal sua sponte based on vindictive prosecution, when the basis for such a claim is Choi's own testimony, which was certainly known to Choi well in advance of trial, and where the claim is wholly devoid of merit.

Choi was prosecuted, along with his twelve fellow demonstrators, on a single count of failure to obey a lawful order. He declined a plea offer that his fellow demonstrators accepted, but the government added no new charges, and, indeed, extended Choi an even more favorable plea offer just days before trial. The fact that on two previous occasions Choi was arrested for handcuffing himself to the White House fence and charged by a different prosecuting authority – the D.C. Office of the Attorney General – with traffic offenses that ultimately were dismissed, does not raise a

presumption that his current prosecution – which was instituted against not just Choi, but against Choi and his twelve fellow demonstrators – is vindictive. Accordingly, the government seeks a writ of mandamus directing the magistrate court to resume trial without considering selective or vindictive prosecution as a defense on the merits, and to prohibit the consideration of the waived claims of selective or vindictive prosecution as grounds for dismissal. Should this Court decline to prohibit the magistrate judge from belatedly considering the waived claims, the government will need to undertake the assessment that it would have undertaken pretrial had the claims been raised in accordance with the federal rules. Despite the lack of merit of the claims, the government will have to assess whether the expenditure of resources that will be required to accumulate and evaluate historical data from various law-enforcement agencies and prosecuting authorities with responsibility over the myriad of cases involving demonstrations in the White House area is warranted in this petty-offense case.

THIS COURT HAS JURISDICTION OVER A PETITION FOR A WRIT OF MANDAMUS TO THE MAGISTRATE JUDGE

Defendant argues that this Court lacks jurisdiction to grant the government's petition because the magistrate judge "is for all intents and purposes the supervising district-court judge by extension" and there is no authority "for a U.S. District Court to order itself to do something" (Opp. at 9-10). This argument is incorrect. Decisions of magistrate judges in criminal cases are appealable to the district court under 28 U.S.C. § 636 and Rule 58(g)(2) of the Federal Rules of Criminal Procedure, and Local Criminal Rule 57.14(7) explicitly authorizes the chief judge of the district court to "hear and determine requests for review of rulings by magistrate judges in criminal cases not already assigned to a judge of the Court."

First, defendant Choi is wrong to equate federal magistrate judges with district court judges.

The judges of the United States district courts are appointed pursuant to Article III of the United States Constitution and have lifetime tenure. See U.S. Const. art III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."); 28 U.S.C. § 134(a) ("The district judges shall hold office during good behavior."). District court judges are appointed by the President and confirmed by the Senate. See 28 U.S.C. § 133(a) ("The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts . . . ."). The judicial power of district court judges is derived directly from the Constitution. See U.S. Const., art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . . ."), as more fully described in 28 U.S.C. § 3231 (vesting district courts with original jurisdiction over "all offenses against the laws of the United States"), and 28 U.S.C. §§ 1330-1344 (vesting district courts with original jurisdiction over civil actions against foreign states, cases raising federal questions, diversity cases, and others).

By contrast, magistrate judges derive their existence and authority from statute, and are appointed not by the President, but by the district court judges, without the advise and consent of the legislative branch. See 28 U.S.C. § 631(a) ("The judges of each United States district court . . . shall appoint United States magistrate judges."). Appointments are not for life, but for eight-year terms, 28 U.S.C. § 631(e), and a magistrate judge may be removed during his or her term by the district court judges of that district for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. § 631(I). The jurisdiction of the magistrate judges is established by 28 U.S.C. § 636 and federal rule, and is not co-extensive with district court jurisdiction. With regard to criminal matters, a magistrate judge has jurisdiction to try persons accused of misdemeanors only when "specially designated to exercise such jurisdiction by the district court or courts he serves,"

18 U.S.C. § 3401(a), and, except for petty offenses, only if the person charged with the misdemeanor waives his right to be tried before a district court judge. Id. at § 3401(b). See also 28 U.S.C. § 636(a)(3) (granting magistrate judges "the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section"). Magistrate judges lack jurisdiction to try felony cases. Rather, upon referral by a district court judge, they may rule on certain pretrial matters in felony cases, and conduct evidentiary hearings, but their rulings are subject to review by the district court. See 28 U.S.C. § 636(b)(1)(A) (district judge may designate magistrate judge to hear and determine certain pretrial matters, but district judge may reconsider any pretrial matter where magistrate judge's order is clearly erroneous or contrary to law); id. at §636(b)(1)(B) (district judge may designate magistrate judge to conduct evidentiary hearing and submit findings of fact and recommendations for disposition to district court, which may accept, reject, or modify the findings and recommendations).

With regard to the jurisdiction of the magistrate judges over petty offenses and misdemeanors, Rule 58 of the Federal Rules of Criminal Procedure governs pretrial procedures, pleas, and appeal. Unlike an appeal from a judgment of conviction entered by a district court, which must be brought in the court of appeals, 28 U.S.C. § 1291, an appeal from a magistrate judge's judgment of conviction must be brought to a district court judge. See Fed. R. Crim. P. 58(g)(2)(B)("A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry."). Interlocutory appeals also are to be brought to the district court, and are permitted only "if a district court's order could be similarly appealed." Fed. R. Crim. P. 58(g)(2)(A).

Although Rule 58 does not include a provision addressing petitions for mandamus, the authority of the district courts is provided by the All Writs Act, 28 U.S.C. § 1651, which authorizes

all courts established by Act of Congress to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." id. at § 1651(a).[2] Given the jurisdiction of the district court to review all orders of magistrate judges in criminal cases, and the explicit wording of Local Rule 57.14(7), which assigns to the Chief Judge the duty to "hear and determine requests for review of rulings by magistrate judges in criminal cases not already assigned to a judge of the Court," this Court is an appropriate court in which to petition for a writ of mandamus to the magistrate judge. Cf. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (traditional use of the writ "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction") (additional quotation and citation omitted); In re Tennant, 359 F.3d 523, 528 (D.C. Cir. 2004) ("'[W]here a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.") (quoting McClellan v. Carland, 217 U.S. 268, 280 (1910)).

As we noted in our petition, it has been the procedural practice in this jurisdiction and others to file a petition for a writ of mandamus directed to a magistrate judge in the district court rather than directly in the court of appeals. In Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991), the Washington Post, which had intervened in a criminal proceeding in order to obtain access to a sealed plea agreement, petitioned the district court for a writ of mandamus directing the magistrate judge to release portions of the plea agreement after the magistrate judge had denied the newspaper's motion requesting the unsealing. Id. at 283-84. The Post also filed an appeal of the magistrate

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[2] Defendant Choi argues that the district court's authority to issue writs of mandamus under the All Writs Act was abrogated by Rule 81(b) of the Federal Rules of Civil Procedure. That rule, however, does not apply to criminal matters, and, at any rate, is directed to the proper styling of a motion for relief, not to the substance. See Fed. R. Civ. P. 81(b) ("The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.")

judge's orders sealing portions of the plea agreement. Id. at 284. The district court denied the petition for a writ of mandamus and affirmed the magistrate judge's decision to seal the plea proceeding. Id. The Washington Post then appealed the district court's order to the court of appeals. The D.C. Circuit, without discussing the propriety of the Washington Post having filed its mandamus petition in the district court, reviewed the merits and, finding that the government had not adequately demonstrated a compelling need for the sealing and that the proper procedures had not been followed, vacated the district court's affirmance, as well as the magistrate judge's decision to seal the plea agreement. Id. at 292. Although the D.C. Circuit did not explicitly approve of the practice of filing the mandamus petition in the district court, it gave no indication that the district court lacked jurisdiction over the petition. See also United States v. Lee, 786 F.2d 951, 954-56 (9th Cir. 1986) (on appeal from district court's denial of petition for writ of mandamus directed to magistrate and dismissal of alternate appeal to district court on grounds that order was not appealable, appellate court determined that order was appealable and reversed district court's dismissal of appeal without discussing propriety of mandamus petition having been brought in district court).

Other courts have more directly indicated that jurisdiction over a mandamus petition directed to a magistrate judge lies with the district court. In United States v. Ecker, 923 F.2d 7 (1991), the First Circuit dismissed an appeal of a commitment order issued by magistrate judge after the magistrate made a finding of incompetency, and rejected the appellant's argument that, if the order was not appealable directly to the court of appeals, it should be treated as a jurisdictionally valid petition for mandamus. Id. at 9. Noting the "near-absolute jurisdictional requirement that magistrates' orders be reviewed in the first instance by the district court," the First Circuit held that "[i]f Ecker wanted a writ of mandamus directing the magistrate to rescind his commitment order, or a writ of prohibition preventing the magistrate from carrying out the order's terms, he should have

directed his argument to the district court originally." Id. (internal citation omitted). See also Califano v. Moynahan, 596 F.2d 1320, 1322 (6th Cir. 1979) (denying petition for writ of mandamus directing district court to pass one way or other on actions of magistrate, because petitioner never sought review in district court; "[i]f the Secretary [of Health, Education and Welfare] conceived that the magistrate had overreached his powers, he should have moved the district judge to vacate the order and directly consider the matter himself . . . ."). Consistent with the "near-absolute jurisdictional requirement that magistrates' orders be reviewed in the first instance by the district court," Ecker, 923 F.2d at 9, this Court has jurisdiction over the instant petition.

THE MAGISTRATE COURT CLEARLY ERRED BY CONSIDERING SELECTIVE PROSECUTION AND VINDICTIVE PROSECUTION AS DEFENSES ON THE MERITS, AND NO ADEQUATE REMEDY OTHER THAN MANDAMUS EXISTS

Defendant Choi concedes that "a selective/vindictive-prosecution [defense] is not on the merits of the charge," and therefore that "any disposition by Judge Facciola of the charge based on selective/vindictive prosecution would be a *dismissal* – not an *acquittal*" (Opp. at 15) (emphasis in original). Choi also concedes that the government has the statutory right to appeal a dismissal on selective- or vindictive-prosecution grounds (Opp. at 16). We agree. Although the evidence adduced thus far does not provide any basis for such a dismissal – and certainly does not provide exceptional circumstances warranting consideration of a claim that was waived because it was not made pretrial – it appears that the government and Choi are in agreement that the selective/vindictive-prosecution claim can not be considered as a defense to the merits of the charge of failure to obey a lawful order.

Based on Choi's concessions, it also appears that the government and Choi may have different understandings about the magistrate court's ruling. Choi seems to understand the magistrate court to be considering selective/vindictive prosecution not as a possible ground for

acquittal, which would not be appealable, but as a possible ground for dismissal, which would be appealable. See Opp. at 15 ("[I]t simply is not true that an actual disposition of the charge by Judge Facciola in Lt. Choi's favor on selective/vindictive-prosecution grounds would be an *acquittal* that would bar Government appeal.") (emphasis in original). The government has the opposite understanding of the magistrate judge's ruling, based on the following: (1) the magistrate judge's pretrial refusal to rule on the government's in limine motion asking the court to preclude evidence of selective prosecution on the grounds that the selective-prosecution claim was waived by Choi's failure to file a motion under Rule 12(b)(3) of the Federal Rules of Criminal Procedure, and the magistrate judge's asking the government "unless and until we get to your making out a prima facie case of his guilt, why are his defenses at all relevant at this point in the process?" (8/29/11 a.m. Tr. 5); (2) the magistrate judge's allowing defense counsel to question witnesses at trial regarding selective and vindictive prosecution, and the magistrate judge's own interjection of questions on the subjects (see Petition at 14-16 (citing examples from the trial transcript)); (3) the magistrate judge's statement, at the beginning of the third day of trial, that "a prima facie case of selective prosecution has been made out" (8/31/11 a.m. Tr. 8); (4) the magistrate judge's affirmative response to the government's question whether the court was going to consider selective/vindictive prosecution as a theory of defense, rather than as a basis for dismissal (8/31/11 p.m. Tr. 3); and (5) the magistrate judge's acknowledgment that if the issue had been raised pretrial and the court had dismissed the case on selective/vindictive-prosecution grounds, the government would have been able to appeal, and its suggestion that, because the trial went forward and jeopardy had attached, any adverse ruling by the court would not be appealable (8/31/11 p.m. Tr. 6-8).[3]

[3] The government tried repeatedly to get clarification as to whether the magistrate judge was considering selective/vindictive prosecution as a theory of defense or as a challenge to the

Ample authority supports the position of Choi and the government that selective/vindictive prosecution is not a defense to the merits of the charge of failure to obey a lawful order. See, e.g., United States v. Armstrong, 517 U.S. 456, 463 (1996) ("A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."); United States v. Washington, 705 F.2d 489, 495 (D.C. Cir. 1983) (selective-prosecution claim "relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged); United States v. (Jerry) Jarrett, 447 F.3d 520, 525 (7th Cir.) (same for vindictive-prosecution claim) (quoting Armstrong, 517 U.S. at 463 (1996)), cert. denied, 549 U.S. 1043 (2006). Thus, the magistrate judge clearly erred in ruling that he would consider selective/vindictive prosecution as a defense on the merits. Accordingly, this Court should issue a writ of mandamus directing the magistrate judge not to consider either claim as a defense to the charge of failure to obey a lawful order.

Choi argues that the writ is not necessary because the government could have appealed to this Court the magistrate judge's mid-trial decision to allow Choi to pursue a selective/vindictive-prosecution defense under Rule 58(g)(2) of the Federal Rules of Criminal Procedure (Opp. at 13-15). With regard to interlocutory appeals, that rule provides "[e]ither party may appeal an order of a magistrate judge to a district judge within 14 days of its entry if a district judge's order could similarly be appealed." Fed. R. Crim. P. 58(g)(2)(A). The government's right to appeal from a decision, judgment, or order of the district court in a criminal case is circumscribed by 18 U.S.C. § 3731, which provides that the government may appeal: (1) an order "dismissing an indictment or

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constitutionality of the charging document, which, if meritorious, would result in dismissal. See 8/31/11 p.m. Tr. 2-9.

information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution"; (2) a decision or order "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information"; and (3) a decision or order "granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release."

The magistrate judge's apparent decision to allow defendant Choi to rely on selective/vindictive prosecution as a defense on the merits is not a decision that would be appealable under 18 U.S.C. § 3731 if it had been made by a district court. It was not a dismissal of the information; it did not suppress or exclude evidence; and it did not release a person or deny a motion for revocation of or modification of the terms of release of a person. Because the magistrate judge's decision is not an appealable order, the United States had no recourse except to seek a writ of mandamus. Indeed, Magistrate Judge Facciola explicitly recognized this when he asked government counsel, "Do you wish me to stop what I'm doing so that you can seek mandamus?" (8/31/11 p.m. Tr. 8).[4]

Defendant Choi next argues that the government is not entitled to mandamus regarding the conceded error by the magistrate court because, at this point, the magistrate judge has not acquitted Choi, and the government can not establish harm from a potential decision (Opp. at 14-15). This

[4] If this Court were to conclude that the magistrate judge's ruling is appealable, we would ask that this Court consider the government's petition as an appeal under Rule 58(g)(2)(A), which was timely filed within 14 days of the magistrate judge's ruling.

argument fails to recognize that, if the magistrate judge enters a judgment of acquittal based on selective or vindictive prosecution, the government will not be able to appeal that judgment for double-jeopardy reasons, thus foreclosing the government's right to appeal that defendant Choi concedes elsewhere in his opposition. See Opp. at 16 ("Double jeopardy does not prohibit further prosecution after successful appeal by the Government of an erroneous legal dismissal during trial.").

Because the magistrate judge clearly erred in announcing that he would consider selective/vindictive prosecution as a defense on the merits, and because the government's appellate rights would be infringed by an acquittal on selective- or vindictive-prosecution grounds, this Court should issue a writ of mandamus directing the magistrate judge to resume trial and proceed to a resolution of defendant Choi's guilt or innocence without regard to any claim of selective- or vindictive prosecution.[5]

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[5] Defendant Choi takes issue with the statement of facts in the government's petition, which was provided as background for this Court. Specifically, Choi suggests that the statement of facts contained two "false assertions" (Opp. at 4). The first, according to Choi, is the government's statement that the defendant refused to leave the area in response to three orders given by the United States Park Police (id.). Choi suggests that the government's factual representation was deceptive because the trial evidence established that Choi was ordered to leave the "sidewalk," and not the "area" (id. at 4-5). This is a factual issue that Choi will be able to fully litigate when trial resumes. Choi will be free to argue that he was not on the sidewalk, but was on the masonry ledge of the White House fence, and so could not obey an order to leave the sidewalk. The government will be free to argue that, under the circumstances, where the Park Police had: (1) created a perimeter around the area of the White House sidewalk and fence with police tape; (2) three times advised the demonstrators that they were in violation of regulations applicable to the "area," that individuals could demonstrate while carrying signs on the center portion of the sidewalk if they continue moving on the sidewalk, and that they "must leave the closed portion of the White House sidewalk now" (8/29/11 a.m. Tr. 74); and (3) after the third warning, advised the demonstrators, "This is your third and final warning. If you do not leave now, you will be arrested." (id., at 78; see also id. at 82), any reasonable person would have understood this to be an order requiring the protestors to remove themselves from the fence bordering the sidewalk and leave the area that had been cordoned off.

Second, Choi asserts that the government misrepresented the facts regarding how the demonstrator group formed and proceeded through Lafayette Park. U.S. Park Police Officer Cameron Easter, a government witness, and James Pietrangelo, a defense witness, testified about

NO EXCEPTIONAL CIRCUMSTANCES WARRANT CONSIDERATION OF A CLAIM OF SELECTIVE OR VINDICTIVE PROSECUTION THAT DEFENDANT COULD HAVE BROUGHT PRETRIAL BUT DID NOT

Defendant Choi argues that the government's petition is precluded under United States v. Washington, 705 F.2d 489 (1989), because the D.C. Circuit in that case approved of the district court's mid-trial resolution of a selective-prosecution claim. Defendant Choi further argues that Magistrate Judge Facciola was doing the same thing in Choi's trial. As we explained above, we do not understand the magistrate judge to have been considering the claim of selective/vindictive prosecution as a legal issue that could be the ground for a mid-trial or post-trial dismissal. We understand the magistrate judge to have indicated his willingness to consider selective/vindictive prosecution as a defense to the merits, which the defendant pressed, but Washington precludes. See id. at 495 (rejecting argument that selective-prosecution should have been decided by jury rather than trial court because selective prosecution "relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged"). In Washington, evidence at trial suggested there could have been a link between the U.S. government's foreign policy and the Israeli government's efforts to solve problems with Black Hebrews settled in Israel, which arguably supported the defendant's claim that she was

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these facts at trial. The evidence established, based upon their testimony, that the defendants originally met with other demonstrators at a private residence before going to the White House area (8/30/11 p.m. Tr. 2-7). As they departed from the residence to travel to the White House, they formed two or three separate groups (8/30/11 a.m. Tr. 26-34; 8/30/11 p.m. Tr. 7-11). Mr. Pietrangelo testified that his group approached from the Treasury Department side (8/30/11 a.m.Tr. 29). At around 1:45 p.m.,Officer Easter saw a group of individuals gathering on the north central side Lafayette Park (8/19/11 a.m. Tr. 13). About ten minutes later, she saw the group "walking two by two" through Lafayette Park across Pennsylvania Avenue to the White house fence (8/29/11 a.m. Tr. 15-16). Upon Mr. Pietrangelo's arrival to the White House area, he "saw one group come out of Lafayette Park . . . moving in a southerly direction" (8/30/11 p.m. Tr. 10-11). Neither Officer Easter's nor Mr. Pietrangelo's testimony contradicts the description of the group's behavior in the government's petition.

impermissibly singled out for prosecution for passport fraud because of her religious beliefs as a member of the Black Hebrews. Id. at 494-95. The trial court permitted discovery by directing the government to provide information about how many passport frauds had been detected since a certain date, how many had been prosecuted, and how many had been prosecuted against Black Hebrews. Id. at 495. The trial court also heard three days of testimony on the subject, and ultimately determined that the defendant had not proved her claim of selective prosecution. Id. On appeal, the defendant argued that the claim should have been resolved by the jury rather than the judge, and this argument was rejected because, as noted above, the issue of selective prosecution is "entirely independent of the ultimate issue of whether the defendant actually committed the crimes for which she was charged." Id. The D.C. Circuit affirmed the trial court's denial of the claim, noting that the trial court had "more than adequately protected appellant's right not to be improperly singled out for prosecution." Id.

In this case, the magistrate judge is sitting as both judge and jury, but the same legal principles apply. If the defendant were permitted to raise a claim of selective or vindictive prosecution at trial – and we believe he should not be for reasons discussed *infra* – that claim would have to be resolved separately from the guilt or innocence of the defendant. We have already discussed how the magistrate judge clearly erred by announcing that he would consider the claim as a defense on the merits, and not separately as a basis for dismissal. It also would be error for the magistrate judge to allow a motion to dismiss on selective/vindictive-prosecution grounds (either filed by the defendant or raised sua sponte by the magistrate judge) at this late date, because defendant Choi has offered no exceptional circumstances excusing his failure to raise the issue in a pretrial motion to dismiss under Rule 12(b)(3)(A). Although Washington held that the trial court in that case "more than adequately protected appellant's right not to be improperly singled out for

prosecution," 705 F.2d at 495, Washington did not hold that, in any case in which selective or vindictive prosecution is asserted mid-trial, the trial court must (or even may) order discovery and hold an evidentiary hearing.[6] Rather, as we pointed out in our petition, absent "exceptional circumstances," "a claim of selective prosecution that is not raised prior to trial is deemed waived." U.S. v. Gary, 74 F.3d 304, 313 (1st Cir.) cert. denied, 518 U.S. 1026 (1996); see also U.S. v. Taylor, 562 F.2d 1345, 1356 (2nd Cir.) (selective-prosecution claim made after five weeks of trial untimely because it alleged a defect in the institution of the prosecution, which must be raised before trial under Rule 12), cert. denied, 432 U.S. 909 (1977); (Ronald) Jarrett v. United States, 822 F.2d 1438, 1442 (7th Cir. 1987) (Rule 12(b) requires motions alleging selective or vindictive prosecution to be made pretrial or they will be deemed waived).

Defendant Choi argues that Rule 12(b)(3)(A) does not apply because selective/vindictive prosecution is a defense that can be determined without a trial of the general issue and therefore, if Rule 12 is applicable at all, the claim falls under Rule 12(b)(2), which applies to "Motions that May be Made Before Trial" (Opp. at 30-31). We agree that a selective-prosecution claim can be determined without a trial of the general issue, but this does not mean Rule 12(b)(2) governs, because a motion to dismiss based on selective prosecution is a motion alleging a defect in the institution of the proceeding which, according to Rule 12(b)(3), "must be raised before trial." This much is plain from the language of Armstrong: "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, *but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.*" 517 U.S. at 463 (emphasis added). As a

[6] The opinion in Washington does not indicate whether the government sought to preclude the selective-prosecution claim on the ground that it was waived, or whether the district court determined that good cause existed to excuse the failure to raise the claim pretrial.

challenge to the very constitutionality of the prosecution, a selective- or vindictive-prosecution claim alleges a defect in the institution of the proceeding that must be brought pretrial.[7] Indeed, in Armstrong, the defendants followed this exact course, filing, in response to their indictment, a motion for discovery or dismissal based on their allegation that they were selected for federal prosecution because they were black. Id. at 459.

We do not deny that, for good cause – which requires "exceptional circumstances," see Gary, 74 F.3d at 313 – a court may permit a defendant to raise a claim of selective or vindictive prosecution mid-trial or post-trial. In this case, however, there are no exceptional circumstances that warrant allowing defendant Choi to raise a claim mid-trial that he could have raised pretrial. With regard to selective prosecution, defendant Choi admits that, on August 24 and 25, before trial, he alerted the government and the magistrate court to the fact that he would be claiming that the government treated him differently than it treated the people who spontaneously gathered outside the White House to celebrate after Osama bin Laden was killed (Opp. at 24). He produced photographs of the White House revelers and asked the magistrate court to take judicial notice of them, which the court did. Thus, Choi necessarily has conceded that he knew the basis for his selective-prosecution claim before trial, yet he still filed no pretrial motion either to dismiss the information or for additional discovery in support of his claim.[8] He cannot now claim that, based

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[7] As we explained in our petition, under Rule 12(e), a motion required to be made pretrial pursuant to Rule 12(b)(3) is waived if not so raised, unless the court excuses the waiver for good cause.

[8] Defendant Choi's pretrial representations were the basis for the government's motion in limine seeking an order precluding Choi from raising a selective-prosecution claim at trial on the grounds that the claim was waived. See Petition at 2-3, 11-14; App. A at 7-12. The government sought a ruling on the motion before trial began, citing Armstrong and Washington, and arguing that selective prosecution is not a trial defense and should be raised pretrial (8/29/11 a.m. Tr. 4-5). Still, defendant Choi made no motion to dismiss, and the magistrate judge nevertheless declined to rule

on exceptional circumstances, he should be allowed to raise his waived selective-prosecution claim mid-trial.[9]

Similarly, defendant Choi cannot now claim that he did not know pretrial the basis for his vindictive-prosecution claim. Defendant Choi argues that he stated his current claim clearly in his testimony, citing several pages of transcript in which he testified that he was charged with municipal traffic violations after his March and April 2010 arrests for chaining himself to the White House fence, and those charges ultimately were dropped, whereas he was charged with a federal crime after his November 2010 arrest (Opp. at 20-22).[10] Choi also argues that the magistrate judge restated his

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on the government's motion, instead asking why Choi's defenses were relevant at that point in the proceeding and directing the prosecutor to call her first witness (id. at 5-6).

[9] Defendant Choi faults the prosecution for not adequately preparing to rebut a selective-prosecution claim, suggesting that the magistrate court's apparent reference to Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), during a March 18, 2011, status conference, put the government on notice of a selective-prosecution claim (Opp. at 23-24). On March 18, when discussing with the parties whether the defendants might be able to plead guilty to disorderly conduct under the District of Columbia Code, as Magistrate Judge Facciola noted the government had done in the early demonstration cases of the 1950s and 60s, the magistrate judge referenced the Shuttlesworth case, asking "[w]asn't that a discon (phonetic) case involving Martin Luther King?" (3/18/11 Tr. 17-18). Defense counsel responded, "Absolutely, Sh[uttlesworth]" (id. at 18). No mention was made of selective prosecution, and Shuttlesworth is not a selective-prosecution case. See Shuttlesworth, 394 U.S. at 148 (invalidating city ordinance that made it an offense to participate in any parade, procession, or public demonstration without first obtaining a permit from the City Commission, where the ordinance provided no criteria for issuing or refusing to issue permits and where the City Commission had refused to issue a permit to the African-American defendants without asserting any grounds for the refusal and without indicating that a permit would be approved if a time and place were selected that would minimize traffic problems). Moreover, even if this reference somehow put the government on notice of a potential selective-prosecution claim, defendant Choi was likewise on notice, and nevertheless filed no pretrial motion to dismiss, nor any mid-trial motion to dismiss, on selective-prosecution grounds. It is not the government's burden to raise potential constitutional challenges to the information pretrial, and there is no merit to Choi's assertions that the government lacked "diligence regarding the selective-prosecution defense" (Opp. at 26).

[10] Choi cites the 8/30/11 p.m. transcript at pages 92-93 as the source of his assertion that he testified that the November protest was "strident," while the March and April protests were "stoic," but that comparison does not appear on those pages, or on any of the nearby pages.

vindictive-prosecution claim clearly at trial, but this was also based entirely on Choi's own testimony (Opp. at 22-23). These assertions refute any suggestion that Choi did not appreciate the basis for his current vindictive-prosecution claim before trial. Despite these admissions, Choi argues that he should be excused from failing to raise his claim pretrial because he "did not have sufficient *prima facie* evidence of selective/vindictive prosecution until the Government disclosed certain evidence of it at trial" (Opp. at 7; see also Opp. at 28, 38). But the only evidence Choi points to does not support a vindictive-prosecution claim.

Choi argues that the evidence elicited at trial was "some of the most damning evidence of selective *and* vindictive prosecution" (Opp. at 38). Specifically, Choi refers to testimony by Lieutenant LaChance that the U.S. Secret Service had alerted the U.S. Park Police in advance to the fact that there was going to be a demonstration at the White House on November 15, 2010, at which protestors, including Choi, would chain themselves to the White House fence (8/29/11 a.m. Tr. 49-52). Choi also refers to LaChance's testimony that he discussed the protest with others in the U.S. Park Police and was forwarded an email from the Solicitor of the Department of the Interior, Randy Myers, to U.S. Park Police Detective Hodge, in which Mr. Myers opined that the act of chaining one's self to the White House fence would violate at least two federal regulations (8/29/11 p.m. 22-29; Supp. App. at J).[11] None of this testimony provides evidence of vindictive prosecution, much less "damning" evidence of vindictive prosecution that warrants allowing Choi to raise a claim of vindictive prosecution at this late date.

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[11] The government is attaching to this reply brief a supplemental appendix, which includes the Myers email. Based on LaChance's testimony, Choi subpoenaed the United States Secret Service for email communications between the U.S. Secret Service and the U.S. Park Police regarding the protest. The Secret Service supplied Choi's counsel with responsive documents on September 21, 2011.

"'Prosecutorial vindictiveness' is a term of art with a precise and limited meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987) (citing United States v. Goodwin, 457 U.S. 368, 372 (1982)). There are two ways a defendant may demonstrate prosecutorial vindictiveness: either by showing "actual vindictiveness – that is, he may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights," or by relying on a presumption of vindictiveness based on facts that indicate "a realistic likelihood of vindictiveness," which the government is obliged to rebut Id. (citations omitted). The doctrine "precludes action by a prosecutor that is designed to penalize a defendant for invoking any legally protected right available to a defendant during a criminal prosecution," United States v. Safavian, 2011 WL 1812348 (D.C. Cir. May 13, 2011), and is thus traditionally seen in cases in which the prosecution adds additional charges after the defendant successfully appeals, id. at *3, or after the defendant asserts the right to trial. Meyer, 810 F.2d at 1244.[12] In such cases, although the adding of charges after the assertion of a constitutional right may raise the presumption of vindictiveness, the government still has the opportunity to rebut the

[12] Choi suggests that he was punished for exercising his right to trial because, after the original plea offer to all thirteen demonstrators was "wired," and he "broke" the "wire" by refusing to plead guilty, the government did not require all thirteen demonstrators to go to trial, but instead maintained the original charge only against the sole person who decided to go to trial, Choi himself (Opp. at 51). This does not establish a presumption of vindictive prosecution. The government did not add charges against Choi, it merely maintained its prosecution based on the original single charge. Nor did the government fail to maintain the original charge against the rest of the demonstrators. The rest of the demonstrators agreed to plead guilty to the original charge pursuant to a deferred-sentencing agreement, under the terms of which their cases were dismissed on September 12, 2011. As Choi admits (Opp. at 51-52), shortly before trial, the government offered Choi an even more favorable disposition, offering him a deferred-prosecution agreement under which, if he were to refrain from being arrested upon probable cause and comply with all release conditions set by the magistrate court for a period of four months, the government would dismiss the criminal complaint. These facts refute rather than support a charge of vindictiveness.

presumption.

Here, Choi suggests that his testimony that he was treated differently in November 2010 than he was treated in March and April 2010, coupled with the evidence that the Park Police had prior knowledge of the protest and had considered in advance how to charge the protestors, raises a sufficient claim of vindictive prosecution to be raised mid-trial, even if such claims ordinarily should be raised pretrial. Although this is not a traditional application of the prosecutorial-vindictiveness doctrine, assuming that Choi has a right not to be prosecuted as punishment for exercising his First Amendment rights, see United States v. P.H.E., Inc., 965 F.2d 848, 849 (10th Cir. 1992) ("The First Amendment bars a criminal prosecution where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected speech."), Choi has not alleged enough to raise even the presumption of vindictiveness, and can not establish cause for failing to raise his claim pretrial.

In Safavian, the district court found a presumption of vindictiveness where the defendant was indicted on five counts, convicted on four counts, appealed, and won reversal or remand of the convictions on all four counts. 2011 WL 1812348 *1. Following failed plea negotiations, the government returned a new indictment charging the defendant with five counts, two of which were based on previously uncharged conduct. Id. at *2. After a jury found him guilty on the new counts, as well as on two of the counts that mirrored the original indictment, he moved for acquittal on the new counts on the ground that they were added to the second indictment due to prosecutorial vindictiveness. Id. Despite finding that the prosecutor's addition of new charges after the defendant's successful appeal raised a presumption of vindictiveness, the district court denied the defendant's motion, finding that the government offered objective evidence sufficient to rebut it. Id. at *4. The D.C. Circuit affirmed. Using language particularly applicable to this case, the Circuit

held that "[t]he [g]overnment was objectively reasonable in responding to this court's ruling on appeal by changing its trial strategy and refocusing the indictment to include conduct lying outside the scope of the defendant's defense." Id. at *5.

In this case, unlike in Safavian, there is no chain of events that raises a presumption of prosecutorial vindictiveness. Choi's March and April cases were charged as violations of a D.C. traffic regulation that prohibits the failure to comply with any lawful order or direction of any police officer vested with authority to direct, control, or regulate traffic. See D.C.M.R. § 2000.2; Supp. App. K. The cases were not presented to the U.S. Attorney's Office, but were presented to and papered by the D.C. Office of the Attorney General (OAG), which has the responsibility for prosecuting traffic offenses. Supp. App. K. The OAG subsequently dismissed the cases, apparently because of concern that standing on the masonry ledge and chaining one's self to the White House fence does not violate the traffic regulations. The cases were not dismissed on motion of defendant Choi, or based on any assertion of a constitutional or statutory right by defendant Choi, but on OAG's own motion. By the time Choi engaged in the same conduct in November 2010, the Park Police had done some additional research and determined that Choi's anticipated conduct (and that of the rest of the demonstrators) could violate 36 C.F.R. § 2.32(a)(2), which prohibits "[v]iolating the lawful order of a government employee or agent authorized to maintain order and control public access and movement during . . . other activities where the control of public movement and activities is necessary to maintain order and public safety." U.S. Park Police Officer Stoudamire testified that, when the Park Police monitor demonstrations at the White House sidewalk, they are concerned about "the safety of the public, the safety of the officers and the safety of the demonstrators," as well as the safety of the individuals inside the White House (8/29/11 p.m. Tr. 144). Officer Stoudamire testified that handcuffing one's self to the White House fence raised a safety concern because, for

example, if an incident arose that required an emergency response by the Park Police and Secret Service in the White House area, the person would be unable to free himself, and the law enforcement officers would have to address that situation during the emergency (8/29/11 p.m. 120-24). The fact that the Park Police responded to the two previously dismissed cases by researching whether chaining one's self to the White House fence and refusing to leave violated any other applicable law or regulation does not suggest vindictiveness on the part of the government. Cf. Safavian, 2011 WL 1812348 at *5 (rejecting defendant's argument that prosecutor's change in strategy was not objective justification for indicting defendant for previously uncharged conduct as "unpersuasive where, as here, the Government changed its trial strategy in response to an adverse ruling of the [appellate] court).[13]

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[13] At trial, Choi testified that he was familiar with the regulations governing demonstrations on the White House sidewalk, and he did not believe that standing on the "stoop" was the same as standing on the sidewalk (8/30/11 p.m. Tr. 85). He further testified that he "understood being on the stoop is technically being in the White House . . . but we cannot get a permit for the White House, being in the White House" (8/30/11 p.m. Tr. 84). The regulations to which Choi was referring are regulations that govern the time, place, and manner for demonstrations in the White House area, which includes "all park areas, including sidewalks adjacent thereto, within these bounds; on the south, Constitution Avenue NW; on the north, H Street NW; on the east, 15th Street, NW.; and on the west, 17th Street NW." 36 C.F.R. § 7.96(g)(1)(v). The regulations provide that demonstrations involving 25 persons or fewer do not require a permit, "provided that the other conditions required for the issuance of a permit are met." Id. at § 7.96(g)(2)(i). No permit may be issued authorizing demonstrations in the White House area, "except for the White House sidewalk, Lafayette Park and the Ellipse." Id. at § 7.96(g)(3)(i). For demonstrations on the White House sidewalk, which is defined as "the south sidewalk of Pennsylvania Avenue NW., between East and West Executive Avenues NW," id. § 7.96(g)(1)(v), "[n]o signs or placards shall be tied, fastened, or otherwise attached to or leaned against the White House fence, lamp posts or other structures on the White House sidewalk," and "[n]o signs or placards shall be held, placed or set down on the center portion of the White House sidewalk, comprising ten yards on either side of the center point along the sidewalk, [p]rovided, however, that individuals may demonstrate while carrying signs on that portion of the sidewalk if they continue to move along the sidewalk. Id. at § 7.96(g)(5)(vii). The act of handcuffing one's self to the White House fence violated these regulations regardless of whether the White House fence (and the "stoop" at its base) is part of the White House sidewalk or is not part of the sidewalk. If the "stoop" is not part of the sidewalk, as Choi contends, then he and the other demonstrators were violating the regulation prohibiting demonstrations anywhere in the

Choi has not established exceptional circumstances that warrant relieving him from the obligation to raise his current claims pretrial. To the contrary, his current claims illustrate the very reason why the federal rules require challenges to the constitutionality of the prosecution to be made pretrial. Had Choi raised either of his current claims pretrial, the magistrate judge could have determined whether Choi made an adequate showing to warrant discovery or further inquiry. The government then could have assessed the claims, determined the extent of resources that would be required to respond to the discovery requests or the asserted claims, and made decisions about whether the expenditure of the government's scarce resources was warranted in order to continue the prosecution. The Supreme Court has recognized the burden associated with responding to a selective-prosecution claim:

> If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

Armstrong, 517 U.S. at 468. In this case, although neither of defendant's claims have merit, responding to either of them would entail not just gathering information related to past prosecutions by the U.S. Attorney's Office, but also gathering historical arrest and prosecution data from the U.S. Park Police, the U.S. Secret Service, and the OAG. Because the offenses charged in demonstration cases are often petty misdemeanors or traffic violations, records and reports may not be as detailed

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White House area other than the White House sidewalk, Lafayette Park, and the Ellipse. If the "stoop" is part of the sidewalk, the protestors were in violation of regulations requiring demonstrators with signs to continue to move along the sidewalk when in the center portion of the sidewalk, and prohibiting the attachment of signs or placards (in this case, themselves and their sign), to the White House fence.

as they would be for more serious offenses. It is likely that, to supplement the raw data, many law-enforcement officers and prosecutors would need to be interviewed. The resource expenditure for the government would be significant. Had defendant Choi filed a motion to dismiss on either selective- or vindictive-prosecution grounds before trial, as required by Rule 12(b)(3), and had the magistrate judge determined that further inquiry was warranted, the government could have made a considered decision regarding whether the costs of responding were justified in order to maintain the prosecution of what is, under the federal regulations, a petty offense.

But that did not happen. Instead, Choi, with full knowledge of the bases for his current claims, filed no motion, and instead sought to raise his selective-prosecution claim at trial as a defense. See 8/30/11 p.m. Tr. 10 ("This Court has done nothing but allow the defendant a bite at the apple and an opportunity to present either selective prosecution or vindictive prosecution as a defense. You have done nothing more than allow us to elicit testimony from the witnesses that might be illustrative of us making such a claim."). The trial to determine Choi's guilt or innocence of failing to obey a lawful order of the Park Police was derailed by defense counsel's questioning on issues related to selective and vindictive prosecution, issues which should have been raised and addressed pretrial. The magistrate judge clearly erred by allowing this to happen, and this Court should issue a writ of mandamus that directs the magistrate judge to preclude any mid-trial or post-trial motion to dismiss based on selective or vindictive prosecution. Should this Court decline to preclude the magistrate judge from considering the waived claims, the government will have to assess whether continuing with the prosecution of defendant Choi is warranted in light of the expenditure of resources that would be required if the magistrate judge decides to entertain Choi's

claims mid-trial or post-trial.[14]

WHEREFORE, the United States respectfully requests that this Court issue a writ of mandamus to the magistrate court as requested in its initial petition.

Respectfully submitted,

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[14] Defendant Choi makes a number of hyperbolic assertions in his opposition that are unsupported by the record. Given the limited scope of this mandamus proceeding, we will not attempt to respond to each of his assertions in this reply. Defendant Choi's personal attack on the Assistant United States Attorney responsible for prosecuting this case, however, can not go unanswered. In his opposition, Choi accuses AUSA Angela George of "suggest[ing] that because Lt. Choi is Gay, he had to have derived pleasure from having male Off. Laska's knee driven into below his buttock," and cites out of context AUSA George's question to Choi asking whether he had any sensation when Officer Laska put his body parts on Choi's body parts (Opp. at 44, citing 8/30/11 p.m. Tr. 90). As the transcript reveals, AUSA George was cross-examining Choi regarding his testimony that he may have blacked out when he fell from the White House fence ledge (8/30/11 p.m. Tr. 88). Her question appropriately challenged this testimony by eliciting Choi's admission that he recalled feeling it when Officer Laska put his knee below Choi's buttocks (8/30/11 p.m. Tr. 89-90). It is a gross mischaracterization of the record to assert that AUSA George's question sought to suggest that Choi derived pleasure from the event.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, on this 28th day of September, 2011, throught the Court's CM/ECF system, upon Norm Kent, Esquire, Kent and Cormican, PA, 110 SE 6th Street, Suite 1970, Ft. Lauderdale, FL 33301, and Robert J. Feldman, Esquire, 14 Wall Street, 20th Floor, New York, NY 10005.

/s/
ANGELA S. GEORGE
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11/15/2010 10:50 AM

To "Hodge, Timothy" <Timothy_Hodge@nps.gov>
cc "Chambers, William" <William_Chambers@nps.gov>, "Guddemi, Charles" <Charles_Guddemi@nps.gov>, "MacLean, Robert" <Robert_MacLean@nps.gov>
bcc
Subject At least two CFR citations may be invoked against protestors who chain themselves to the White House fence

History: This message has been forwarded.

Sgt Hodge:

This follows up on our telephone conversation this morning, to confirm that the Solicitor's Office believes that the act of chaining oneself to the White House fence violates at least two NPS regulations. First, it could constitute disorderly conduct under 36 CFR 2.34(a)(4), which prohibits anyone Awith intent to cause public alarm, nuisance, jeopardy ... or knowingly or recklessly creating a risk thereof@ that Acreates or maintains a hazardous or physically offensive condition.@ Second, it could constitute tampering under 36 CFR 2.31(a)(2), which prohibits A[t]ampering or attempting to tamper with property ... except when such property is under one=s lawful control or possession.@

Indeed, while both NPS regulations provide the legal basis that make such chaining illegal, if the violator fails to obey a Park Police order to unchain, you may be free to cite the violator under another charge: NPS=s 36 CFR 2.32(a)(2) which prohibits failure to obey a lawful order. [The act of chaining oneself to the White House fence, in itself, may not technically violate 36 CFR 7.96(g)(5)(vii) insofar as it prohibits Asigns or placards@ being Atied, fastened, or otherwise attached to or leaned against the White House fence, lamp posts or other structures on the White House sidewalk@]

The NPS=s regulatory history of its disorderly conduct regulation, found at 47 Federal Register 11598, 11607 (March 17, 1982), explained that A[t]he concept of >jeopardy= is meant to apply to situations or hazards which threaten physical harm or injury. The term >nuisance is meant to be construed in accordance with its commonly accepted legal definition. For purposes of this regulation, the definition set forth in Blacks Law Dictionary is instructive: >That class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to the right of another or to the public, and producing such material annoyance, inconvenience, discomfort, or hurt, that the law will presume resulting damage.= Blacks Law Dictionary (5th ed. 1979). >Public alarm= is meant to prohibit actions which will produce an apprehension of danger or excite with sudden fear.@ Chaining oneself obviously works as Aan obstruction of or injury to the right of another or to the public @ insofar as it hinders the views and reactions of security personnel to monitor and protect such an extremely important physical barrier of the White House complex, and may pose a hazard which threatens physical harm or injury, especially in this sensitive post-911 world where explosive-laden persons have breached governmental secured areas.

The NPS=s regulatory history of its tampering regulation, found at 48 Federal Register 30252, 30270 (June 30, 1983), explained that this section Ais designed to address incidents where unauthorized

manipulation of the property, real property or the component parts thereof has occurred or is occurring, and the elements of other criminal offenses such as theft, trespassing, burglary or vandalism have not been realized. The National Park Service views the utilization of this section as a means to prevent unauthorized activities from developing into more serious offenses.@ We believe that chaining oneself to a fence constitutes such an unauthorized Amanipulation@ of Federal property.

This is consistent with *Green v. Lujan* , No. 90-2293 (D.D.C. February 11, 1991), which cites Restatement (Second) of Torts " 202, 821B (1965, 1979)=s public nuisance as Aan unreasonable interference with a right common to the general public@ including but not limited to Aconduct which is prescribed by a statute, ordinance or administrative regulation.@ Indeed, demonstrators who have chained themselves in public areas or on private property have been convicted under various state laws. In *People of the State of New York v. Berardi* , 690 N.Y.S.2d 916 (N.Y. City Crim. Ct. 1999), the court held that New York=s disorderly conduct law applied where demonstrators chained themselves in front of a department store=s doorway, finding that the chaining caused public inconvenience, annoyance or alarm. In *Huffman and Wright Logging Co. V Wade* , 857 P.2d 101 (Oregon 1993) the court noted the earlier convictions of demonstrators, who chained themselves to logging equipment, in violation of the Oregon criminal mischief law that prohibits tampering or interfering with property of another with an intent to cause substantial inconvenience to another. In *State of North Dakota v. Purdy* , 491 N.W.2d 402 (North Dakota 1992), the court affirmed a conviction for physical obstruction of a government function under North Dakota law, where the demonstrators used cryptonite locks to lock themselves together in an abortion clinic, finding that the act of locking themselves together was to impede or hinder police and where it took three hours for locksmiths to safely remove them.

While we believe that chaining oneself violates 36 CFR2.34(a)(4) and 36 CFR2.31(a)(2) , we will defer to the prosecutor=s assessment of the facts of the particular case as to what charge they proceed with. And if a prosecutor elects to go forward with some other charge, their changing the charge cannot negate the legality of the officer=s initial charge, since it has been long recognized that "an arrest will be upheld if probable cause exists to support arrest for an offense [even if] that is not denominated as the reason for the arrest by the arresting officer." *United States v. Joyner* , 492 F.2d 655, 656 (D.C. Cir. 1974). *See also Washington Mobilization Comm. v. Cullinane* , 566 F.2d 107, 123 (D.C. Cir. 1977) ("A policeman on the scene cannot be expected to assay the evidence with the technical precision of a prosecutor drawing an information."); *Christensen v. United States* , 259 F.2d 192, 193 (D.C. Cir. 1958) ("In determining whether there was probable cause for the arrest, we must view the situation as it appeared to 'the eyes of a reasonable, cautious and prudent police officer under the circumstances of the moment.'").

I hope that this information is useful. I have no objections if you share this with prosecutors. If you or they have any questions, please do not hesitate to contact me at (202) 208-4338.

Randy Myers

Randolph J. Myers
U.S. Department of the Interior, Office of the Solicitor

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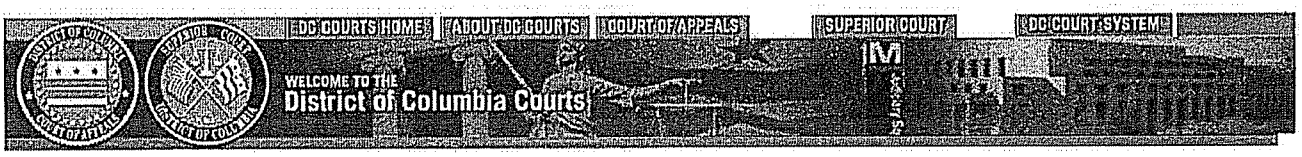
TAB K



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Case Search for Person: CHOI, DANIEL

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2010 CDC 006977: District of Columbia Vs. CHOI, DANIEL W

Case Type: Dist Of Col	File Date: 04/21/2010
Status: Closed	Status Date: 04/21/2010
Disposition: Nolle Prosequi	Disposition Date: 07/14/2010

Next

Party Name	Party Alias(es)	Party Type	Attorney(s)
CHOI, DANIEL W		Defendant (Criminal)	KATZ, Mr JONATHAN L

Docket Date	Description	Messages
07/14/2010	Event Resulted - Release Status:	Event Resulted - Release Status: Government does not wish to proceed in this matter. The following event: Non-Jury Trial scheduled for 07/14/2010 at 9:00 am has been resulted as follows: Result: Dismissed - Nolle Judge: SULLIVAN, FREDERICK Location: Courtroom 120 DANIEL W CHOI (Defendant (Criminal)); ; Mr JONATHAN L KATZ (Attorney) on behalf of DANIEL W CHOI (Defendant (Criminal)); Judge FREDERICK SULLIVAN
07/14/2010	Case Disposed - Nolle Prosequi	Case Disposed - Nolle Prosequi
07/14/2010	Charge Disposed - Nolle Prosequi	Charge Disposed - Nolle Prosequi
05/26/2010	Motion Filed:	Motion for Entry of Appearance of Counsel Attorney: GOLDSTONE, Mr MARK L (394135)
05/12/2010	Response to Motion Filed:	Government's Response to Defendant's Motion for an Order for a Bill of Particulars (MOTION DENIED) Attorney: BROWN, Ms MARY K (441114)
05/04/2010	Motion Filed:	Defendant's Motion for a Speedy Trial Filed: Attorney: KATZ, Mr JONATHAN L (425615)
05/04/2010	Information Docket:	Defendant's Request for Discovery and Production of Documents Introduction Attorney: KATZ, Mr JONATHAN L (425615)
05/04/2010	Motion Filed:	Defendant's Motion for an Order for a Bill of Particulars Attorney: KATZ, Mr JONATHAN L (425615)

Docket Date	Description	Messages
04/21/2010	Stay Away Order Filed	Stay Away Order Filed
04/21/2010	Event Resulted - Release Status:	Event Resulted - Release Status: Personal Recognizance - The Defendant was arraigned. The Defendant pled not guilty. Speedy Trial rights were asserted. Case continued for Non-jury trial. The following event: Traffic - Lockup Arraignments scheduled for 04/21/2010 at 2:00 pm has been resulted as follows: Result: Defendant Pled Not Gity Trial Rights Were Asserted Judge: RINGELL, RICHARD H Location: Courtroom 115 DANIEL W CHOI (Defendant (Criminal)); ; Mr JONATHAN L KATZ (Attorney) on behalf of DANIEL W CHOI (Defendant (Criminal)); Judge RICHARD H RINGELL on behalf of Judge FREDERICK SULLIVAN
04/21/2010	Notice to Return to Court Filed	Notice to Return to Court Filed Notice to Return to Court Sent on: 04/21/2010 16:53:21
04/21/2010	Release Conditions	Release Conditions Pretrial Services Release Form Sent on: 04/21/2010 16:46:28
04/21/2010	Release Conditions	Release Conditions Party Name: CHOI, DANIEL W Party Type: Defendant (Criminal) 1) Stay Away From:: BOND, Entry Date: 04/21/2010, Completion Date: , Amended Date: Stay away from the White House, 1600 Pennsylvania Ave NW Washington, DC
04/21/2010	CJA Eligibility	CJA Eligibility
04/21/2010	Event Scheduled	Event Scheduled Event: Non-Jury Trial Date: 07/14/2010 Time: 9:00 am Judge: SULLIVAN, FREDERICK Location: Courtroom 120
04/21/2010	Attorney Appointed/Dismissed	Attorney Appointed Attorney KATZ, Mr JONATHAN L representing Defendant (Criminal) CHOI, DANIEL W as of 04/21/2010
04/21/2010	Charge Filed	Charge Filed Charge #1: Failure To Obey a Lawful Order
04/21/2010	Event Scheduled	Event Scheduled Event: Traffic - Lockup Arraignments Date: 04/21/2010 Time: 2:00 pm Judge: RINGELL, RICHARD H Location: Courtroom 115

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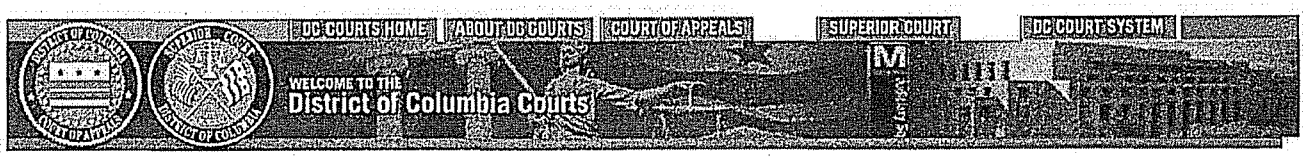

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Case Search for Person: CHOI, DANIEL

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2010 CDC 004862: District of Columbia Vs. CHOI, DANIEL

Case Type: Dist Of Col	File Date: 03/19/2010
Status: Closed	Status Date: 03/19/2010
Disposition: Nolle Prosequi	Disposition Date: 07/14/2010

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Party Name	Party Alias(es)	Party Type	Attorney(s)
CHOI, DANIEL		Defendant (Criminal)	GOLDSTONE, Mr MARK L

Docket Date	Description	Messages
07/14/2010	Event Resulted - Release Status:	Event Resulted - Release Status: Government does not wish to continue in this matter. The following event: Non-Jury Trial scheduled for 07/14/2010 at 9:00 am has been resulted as follows: Result: Dismissed - Nolle Judge: SULLIVAN, FREDERICK Location: Courtroom 120 DANIEL CHOI (Defendant (Criminal)); ; Mr JONATHAN L KATZ (Attorney) on behalf of DANIEL CHOI (Defendant (Criminal)); Judge FREDERICK SULLIVAN
07/14/2010	Case Disposed - Nolle Prosequi	Case Disposed - Nolle Prosequi
07/14/2010	Charge Disposed - Nolle Prosequi	Charge Disposed - Nolle Prosequi
06/05/2010	Attorney Appointed/Dismissed	Attorney Retained Attorney GOLDSTONE, Mr MARK L representing Defendant (Criminal) CHOI, DANIEL as of 06/05/2010
06/05/2010	Attorney Appointed/Dismissed	Attorney Withdrawn Attorney KATZ, Mr JONATHAN L withdrawn for CHOI, DANIEL on 06/05/2010
06/05/2010	Attorney Appointed/Dismissed	Motion for Entry of Appearance of Counsel Attorney: GOLDSTONE, Mr MARK L (394135)
06/05/2010	Information Docket:	Praecipe- Withdrawal of Mr. KATZ as counsel for the Defendant Attorney: KATZ, Mr JONATHAN L (425615)
05/25/2010	Order Entered on the Docket	Order Denying Defendant's Motion. Entered on the Docket on May 25,2010. Signed in Chambers by Judge Sullivan on May 25, 2010. Mailed on May 25, 2010. co.

Docket Date	Description	Messages
05/19/2010	Response to Motion Filed:	Government's Response to Defendant's Motion for an Order for a Bill of Particulars Filed: Attorney: BROWN, Ms MARY K (441114)
04/30/2010	Motion Filed:	Defendant's Motion for an Order for a Bill of Particulars Filed: Attorney: KATZ, Mr JONATHAN L (425615)
04/26/2010	Attorney Appointed/Dismissed	Praecipe Attorney: KATZ, Mr JONATHAN L (425615)
04/26/2010	Event Resulted - Release Status:	Event Resulted - Release Status: This date should have been vacated on 4/21/10. The defendant has another trial date set on 7/14/10 in courtroom 120. Jonathan Katz is counsel in that case as well. The following event: Ascertainment of Counsel scheduled for 04/26/2010 at 9:00 am has been resulted as follows: Result: Hearing Vacated Judge: SULLIVAN, FREDERICK Location: Courtroom 115 Participant(s): Judge FREDERICK SULLIVAN
04/26/2010	Praecipe Not Submitted by Attorney	Praecipe Not Submitted by Attorney
04/26/2010	Attorney Appointed/Dismissed	Attorney Retained Attorney KATZ, Mr JONATHAN L representing Defendant (Criminal) CHOI, DANIEL as of 04/21/2010
04/26/2010	Event Scheduled	Event Scheduled Event: Non-Jury Trial Date: 07/14/2010 Time: 9:00 am Judge: SULLIVAN, FREDERICK Location: Courtroom 120
04/26/2010	Case Transferred to Another Judge	Case Transferred to Another Judge The judge was changed from RINGELL, RICHARD H to SULLIVAN, FREDERICK
03/19/2010	PDID Correction	Correction to Defendant's Name
03/19/2010	CJA Eligibility	CJA Eligibility
03/19/2010	Event Resulted - Release Status:	Event Resulted - Release Status: PR - The defendant was arraigned. The defendant pled not guilty. Speedy Trial rights were asserted. Case continued for Ascertainment of Counsel. The following event: Traffic - Lockup Arraignments scheduled for 03/19/2010 at 2:00 pm has been resulted as follows: Result: Defendant Pled Not Gity Trial Rights Were Asserted Judge: RINGELL, RICHARD H Location: Courtroom 115 CHOI D WOOK (Defendant (Criminal)); ; Judge RICHARD H RINGELL
03/19/2010	Notice to Return to Court Filed	Notice to Return to Court Filed Notice to Return to Court Sent on: 03/19/2010 14:36:08
03/19/2010	Event Scheduled	Event Scheduled Event: Ascertainment of Counsel Date: 04/26/2010 Time: 9:00 am Judge: RINGELL, RICHARD H Location: Courtroom 115
03/19/2010	Charge Filed	Charge Filed Charge #1: Fail to Obey Officer
03/19/2010	Event Scheduled	Event Scheduled Event: Traffic - Lockup Arraignments Date: 03/19/2010 Time: 2:00 pm Judge: RINGELL, RICHARD H Location: Courtroom 115

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